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No. 86-1440

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MONSOUR MEDICAL CENTER,
Petitioner,

v.

OTIS R. BOWEN, M.D., Secretary of the United States Department of Health and Human Services, and WILLIAM L. ROPER, M.D., Administrator, Health Care Financing Administration,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. The decision of the Ninth Circuit in *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), is not consistent with the Third Circuit's decision in this case. In *ITT Rayonier* the Ninth Circuit held that the United States was collaterally estopped by a state court judgment against the Washington State Department of Ecology (DOE). Although the Solicitor General explicitly "question[s] the correctness of that decision," Respondents' Brief at 13 n.8, the Solicitor argues that

there is no tension between *ITT Rayonier* and the Third Circuit's decision in this case because the only question at issue here is whether a judgment against a Medicare fiscal intermediary can have preclusive effect in a proceeding before the Provider Reimbursement Review Board (PRRB). Nothing justifies so narrow a definition of the question in this case. Contrary to the Solicitor's characterization, the statutory scheme in *ITT Rayonier* did not mandate the application of preclusion principles. The Ninth Circuit relied instead on the general policies underlying collateral estoppel.

2. The Solicitor General, like the Third Circuit, assumes that nonparty estoppel is available only in the precise factual circumstances of *Montana v. United States*, 440 U.S. 147 (1979). *Montana*, however, did not announce a unique and fact-bound rule but rather articulated general principles for nonparty collateral estoppel. One major concern emphasized in *Montana* was the need to avoid inconsistent rulings, a consideration that is heightened when a federal court totally ignores a state-court judgment. *See University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226-3227 (1986). But the Solicitor's brief completely disregards the injury to the judicial system and to litigants caused by the failure to apply collateral estoppel in this case. As the brief of the *Amici Curiae* points out, inconsistent rulings impose grave hardships on litigants and needlessly consume decisionmaking resources.

3. The Solicitor's assertion that nonparty preclusion is permitted only where a party is "legally accountable for representing the non-party's interests" is not supported by most of the authority cited. *See* Respondents' Brief at 12. In *ITT Rayonier*, for example, the Ninth Circuit found the federal agency estopped by a judgment to which it was not a party even though no legally cognizable agency relationship existed between EPA and the State Department of Ecology (DOE). *See ITT Rayonier*, *supra*, 627 F.2d at 1003. The state agency was no more

legally accountable to EPA than Blue Cross was to the Secretary in this case. *See also Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974)(no reference to legal accountability; nonparty estoppel against fiduciary representative held one of "several exceptions" to rule against nonparty estoppel); *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1411 n.8 (D.C. Cir. 1985) (not determining scope of nonparty estoppel because interests of present plaintiffs not sufficiently related to interests of the litigants in the prior law suit).

In any event, Petitioner has not argued for collateral estoppel on the basis of some accidental or abstract "coincidence of interests," Respondents' Brief at 12, between Blue Cross as private insurer and the Secretary. To the contrary, in this case Blue Cross and the Secretary have the identical concrete interest in the application of the same Medicare regulation to the same factual record. Moreover, as the *amici* point out, because the Secretary and fiscal intermediaries have created close ties between the Medicare program and private health insurance, the situation presented in this case will recur. Thus the Solicitor misses the crucial issue when he argues that collateral estoppel is unavailable because the state-court judgment was rendered against Blue Cross "in its capacity as a private insurer." The real issue is whether the policies articulated in *Montana*, when applied to the close relationship between the interests of Blue Cross as fiscal intermediary and Blue Cross as private insurer, justify collateral estoppel.[1]

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1. The Solicitor's suggestion that even a judgment against the Medicare fiscal intermediary would not be binding on the federal government in further litigation against Monsour Medical Center, *see* Respondents' Brief at 9-10, is directly contrary to this Court's holding in *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984) (approving use of mutual defensive collateral estoppel against the federal government).

4. The Solicitor's brief suggests that administrative agencies must apply preclusion law only if required by a specific statute or regulation. Although the applicability of collateral estoppel and res judicata to administrative proceedings has not been definitively determined, the weight of authority indicates that preclusion is the rule rather than the exception. In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 469-470 (1982), this Court strongly suggested that the Equal Employment Opportunity Commission (EEOC) would be required to give preclusive effect to any state court judgment in the EEOC's determination of a complaint of discrimination. The Court reached this conclusion even though Congress explicitly provided by statute that state *administrative* determinations concerning discrimination are entitled only to "substantial weight" in EEOC proceedings. *See* 42 U.S.C. § 2000e-5(b). *See also University of Tennessee v. Elliott, supra*, 106 S. Ct. at 3225-3227. Significantly, *Kremer* assumed that preclusion would apply absent an express congressional intent to the contrary. *See also Graybill v. United States Postal Serv.*, 782 F.2d 1567, 1571 (Fed. Cir.), *cert. denied*, 107 S. Ct. 462 (1986); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981).[2] When squarely faced with an agency's

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2. No such congressional intent can be found in the Medicare statute. The district court's assertion that "[s]erious questions remain concerning whether Medicare could have participated in the state court hearing without exhausting federal procedures under the Social Security Act," Pet. App. A-27, misreads the Medicare statute and its implementing regulations. The Secretary faces no exhaustion requirement. Both 42 U.S.C. §1395*oo* (1982 & Supp. III) and 42 C.F.R. §§405.1801 to 405.1890 (1986) require only that the "provider" initially challenge a reimbursement decision before the PRRB.

refusal to give preclusive effect to a prior judgment, the Second Circuit did not hesitate to reverse that decision. *See Safir v. Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970).[3]

5. The Solicitor also argues that the Third Circuit properly deferred to the Secretary's interpretation of the related-parties regulation as focusing on control at the time of the sale while simultaneously contending that this decision is consistent with prior cases holding that *all* circumstances before and after a transaction are relevant to relatedness. But the Third Circuit and the Secretary focused exclusively on facts at the time of the sale without acknowledging that this new interpretation of the related-parties regulation was inconsistent with the Provider Reimbursement Manual, with the Secretary's own decisions and with other circuits' rulings. *See* Petitioner's Brief at 18-21.

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3. Even if preclusion principles were not mandatory in agency decisionmaking, however, a federal court nonetheless would have to apply principles of collateral estoppel. *See, e.g.*, 28 U.S.C. §1738; *University of Tennessee v. Elliott, supra*, 106 S. Ct. at 3225-3227 (policies of federalism and repose generally require federal courts to apply preclusion principles); *Allen v. McCurry*, 449 U.S. 90, 99 (1980). The Administrative Procedure Act requires a court to set aside an administrative decision that is arbitrary, capricious or not in accordance with law. *See* 5 U.S.C. §706. The PRRB's decision directly contradicts the decision of the Pennsylvania courts. The Pennsylvania judgment is the controlling law for purpose of the Administrative Procedure Act, and consequently the PRRB's decision was not in accordance with law.

Respectfully submitted,

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